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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ALGER FREDERICK HELLARD, Appellant.	2 CA-CR 2011-0068 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200900301

Honorable Wallace R. Hoggatt, Judge

REVERSED AND REMANDED

Thomas C. Horne, Arizona Attorney General
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B R A M M E R, Judge.

¶1 Alger Hellard appeals from his conviction and sentence for manslaughter. He argues the trial court abused its discretion by refusing his proffered jury instruction on

justification of use of force in crime prevention. We reverse Hellard's conviction and sentence and remand for further proceedings.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to the party requesting the instruction. *See State v. King*, 225 Ariz. 87, ¶ 13, 235 P.3d 240, 243 (2010). Hellard and his wife, T., had an altercation one evening and during a physical struggle, T. sustained a gunshot wound to her head from a handgun, which resulted in her death. The handgun had been stored in an open drawer on a shelf in the couple's bedroom closet. There were three other firearms in the closet.

¶3 At the time of her death, T. had a blood alcohol concentration of 0.202. A sample of Hellard's blood contained no alcohol. Hellard testified at trial that, on the night of T.'s death, she had been drinking beer and had taken two Xanax pills. She began arguing with Hellard about their finances. Hellard went into the bedroom with their daughter to watch television. T. went in and out of the bedroom arguing with Hellard and pulling the covers off the bed. Hellard then took their daughter to the living room. T. remained upset and began throwing objects around the house. Hellard testified T. eventually told him "the least [he] could do [was] get up and talk to her," after which Hellard joined her in the bedroom.

¶4 T. began pulling things out of the closet, including sweaters, a treasure chest box, and a gun holster, breaking hangers in the process. T. had to climb up onto a dresser to reach items on the top shelf of the closet. Hellard observed T. look up at the

gun box, grab the closet shelf and Hellard's shoulder, and start to boost herself onto the dresser. Hellard believed she was going for the handgun because "she was staring at it and climbing up there." He pushed her hand off his shoulder, "pushed her back onto the dresser[,] and then reached over and grabbed the gun down." Hellard testified he then grabbed the weapon to keep T. from getting it because he was worried about her "being drunk and irate and having a gun" and "worried about her and the baby getting hurt."

¶5 Hellard backed out of the closet against the bed, holding the gun in his left hand and holding his right hand out to prevent T., who was following him, from getting closer. T. began hitting and kicking Hellard and grabbing the gun and his wrist, while Hellard tried to push her away with his right hand. Hellard and T. struggled over the gun, but when she pulled back he leaned towards her and they fell. When they fell the gun discharged and T. was shot in the head.

¶6 Hellard was charged with first-degree murder, second-degree murder, manslaughter, child abuse, and child endangerment.[1] He requested jury instructions on justification for self defense, justification for defense of a third person, and justification for use of force in crime prevention. The trial court rejected the crime prevention instruction but instructed the jury on self defense and defense of a third person. The jury convicted Hellard of the lesser-included offense of manslaughter, and the court sentenced him to a presumptive, 10.5-year prison term. This appeal followed.

[1]The trial court entered a judgment of acquittal on the child abuse charge and the jury acquitted Hellard of child endangerment.

Discussion

¶7 Hellard argues the trial court abused its discretion by denying his requested jury instruction based on A.R.S. § 13-411, which provides as follows:

> **A.** A person is justified in threatening or using both physical force and deadly physical force against another if and to the extent the person reasonably believes that physical force or deadly physical force is immediately necessary to prevent the other's commission of . . . manslaughter . . . or aggravated assault . . . .
>
> **B.** There is no duty to retreat before threatening or using physical force or deadly physical force justified by subsection A of this section.
>
> **C.** A person is presumed to be acting reasonably for the purposes of this section if the person is acting to prevent the commission of any of the offenses listed in subsection A of this section.
>
> . . . .

2006 Ariz. Sess. Laws, ch. 199, § 3.[2] We review for an abuse of discretion the court's determination whether to give a proffered jury instruction and, even if we find such an abuse, we will not reverse a conviction unless the court's decision prejudiced the defendant. *State v. Garfield*, 208 Ariz. 275, ¶ 11, 92 P.3d 905, 908 (App. 2004).

¶8 "'[A] defendant is entitled to a justification instruction if it is supported by the slightest evidence.'" *State v. Ruggiero*, 211 Ariz. 262, ¶ 10, 120 P.3d 690, 692 (App. 2005), *quoting State v. Hussain*, 189 Ariz. 336, 337, 942 P.2d 1168, 1169 (App. 1997).

[2]We apply the version of the statute that existed at the time the offense was committed. *See State v. Superior Court*, 139 Ariz. 422, 427, 678 P.2d 1386, 1391 (1984).

An instruction should not be given "'unless it is reasonably and clearly supported by the evidence.'" *Id.*, *quoting State v. Walters*, 155 Ariz. 548, 553, 748 P.2d 777, 782 (App. 1987).

¶9 We conclude the trial court abused its discretion in rejecting the instruction. *See Garfield*, 208 Ariz. 275, ¶ 11, 92 P.3d at 908. Hellard testified that when T. began climbing in the closet and looking at the gun, he had "pushed her back onto the dresser and then reached over and grabbed the gun down" because he had believed she was "going to go for" the gun. He wanted to prevent her from getting the gun because she was "drunk and irate" and he was "worried about her and the baby getting hurt." He testified she had tried to take the gun out of his hand and he had attempted to keep it away from her. He pushed T. away but she was hitting and kicking him and grabbing the gun and his wrist. In the course of the struggle, Hellard and T. fell and the gun discharged.

¶10 This testimony at minimum constitutes the slightest evidence Hellard reasonably could have believed physical force was "immediately necessary to prevent [T.]'s commission of" aggravated assault or manslaughter.[3] § 13-411(A); *see also*

[3]Aggravated assault includes using a deadly weapon and "[i]ntentionally, knowingly or recklessly causing any physical injury to another person;" "[i]ntentionally placing another person in reasonable apprehension of imminent physical injury;" and "[k]nowingly touching another person with the intent to injure, insult or provoke such person." A.R.S. § 13-1203(A); A.R.S. § 13-1204(A)(2). Manslaughter includes "[r]ecklessly causing the death of another person" and "[c]ommitting second degree murder . . . upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim." A.R.S. § 13-1103(A).

Ruggiero, 211 Ariz. 262, ¶ 10, 120 P.3d at 692. Section 13-411, among other things, allows residents to use force to prevent other residents from committing the enumerated crimes, consistent with the legislature's intent that "residents be totally respected and protected" in their homes. *State v. Korzep*, 165 Ariz. 490, 494, 799 P.2d 831, 835 (1990). There is evidence Hellard believed he needed to push T. out of the way and take the handgun out of the closet to keep it from her, and his struggle with T. over the gun occurred because she tried to take it from him. Based on her behavior, Hellard could have "reasonably believe[d]" T. might have used the gun to commit aggravated assault or manslaughter and thus it was "immediately necessary" that he use physical force or deadly physical force to prevent her from obtaining the gun and using it.[4] § 13-411(A). And the gun's discharge was a "natural consequence of the struggle" for it.[5] *See State v.*

[4]The state contends the evidence did not support a need for Hellard to get the handgun out of the closet, thus he "interjected it into the argument." The state relies on *State v. Jones*, 95 Ariz. 4, 8, 385 P.2d 1019, 1021 (1963), for the proposition that "the accused cannot set up in his own defense a necessity which he brought upon himself." Hellard testified he had taken the handgun out of the closet because he had thought T. was going to get it. His testimony is the "slightest evidence" from which a jury could conclude he had acted reasonably and thus supports the instruction. *See Ruggiero*, 211 Ariz. 262, ¶ 10, 120 P.3d at 692.

[5]The trial court reasoned the instruction was inappropriate because there was no evidence Hellard had intended to shoot T. and the charges were based on the shooting rather than on the struggle. But Hellard's testimony supports the conclusion that the shooting was a direct and "natural consequence" of the struggle for the weapon, regardless of whether he intended to shoot T. *See Plew*, 150 Ariz. at 78 n.1, 722 P.2d at 246 n.1. Moreover, we note *Hussain* also involved a struggle and the defendant testified the victim was stabbed in the course of the struggle after the victim had threatened the defendant with a knife. 189 Ariz. at 337, 338, 942 P.2d at 1169, 1170 (concluding crime prevention instruction supported by slightest evidence).

Plew, 150 Ariz. 75, 78 n.1, 722 P.2d 243, 246 n.1 (1986). Because there was evidence that reasonably and clearly supported giving the proffered instruction, *see Ruggiero*, 211 Ariz. 262, ¶ 10, 120 P.3d at 692, the court abused its discretion in refusing to instruct the jury as requested, *see Garfield*, 208 Ariz. 275, ¶ 11, 92 P.3d at 908.

¶11 We cannot say the trial court's failure to instruct the jury based on § 13-411 was harmless error solely because the court also had instructed the jury on self defense, A.R.S. § 13-404, and defense of a third person, A.R.S. § 13-406. *See Garfield*, 208 Ariz. 275, ¶ 15, 92 P.3d at 909. Section 13-411 "presents a unique defense." *Id.* The only limitation on the use of deadly force under § 13-411 is the reasonableness of the response, but the other justification defenses "require an immediate threat to personal safety before deadly force may be used." *Korzep*, 165 Ariz. at 492, 799 P.2d at 833. And the crime prevention defense presumes the defendant's conduct is reasonable, a presumption absent from the other justification statutes. *Id.*; § 13-411(C). Moreover, § 13-411 is "more permissive because not all of the enumerated crimes are inherently life-threatening." *Korzep*, 165 Ariz. at 492, 799 P.2d at 833. We recognize § 13-411 and the other justification statutes can overlap, and there is no error in refusing to give instructions adequately covered by others, but § 13-411 "differs in several respects from the other justification defenses" and thus its essence was not covered adequately by the self defense and defense of third persons instructions given here. *See id.* at 492, 494 n.1, 799 P.2d at 833, 835 n.1.

Disposition

¶12 For the foregoing reasons, we reverse Hellard's conviction and sentence for manslaughter and remand the case to the trial court for further proceedings.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge